

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: December 15, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Joseph Marchfield*

*v.*

*Kyle C. Chittock*

—  
Opposition No. 91252988  
—

Gavin J. O’Keefe of McDonnell Boehnen Hulbert & Berghoff LLP  
for Joseph Marchfield.

Christopher J. Day of Day Law Firm  
for Kyle C. Chittock.

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Before Taylor, Greenbaum and Hudis,  
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Kyle C. Chittock (“Applicant”) seeks registration on the Principal Register of the mark BOLTON and design, as displayed below, for “electric bicycles” in International Class 12.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88253336 was filed on January 8, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and is based upon Applicant’s claim of first use anywhere and in commerce at least as early as November 20, 2018.



The mark is described in the application as follows: “The mark consists of the word ‘Bolton’ in a custom italicized capital font with a lightning bolt making up a portion of the letter ‘B.’” Color is not claimed as a feature of the mark.

Joseph Marchfield (“Opposer”) opposes registration of Applicant’s mark on the ground of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), alleging ownership of his previously used and registered mark VOLTON (the subject of Registration No. 4243677), in standard characters, for “bicycles” in International Class 12.<sup>2</sup>

Opposer, in addition, alleges common law rights in the mark VOLTON in association with bicycles since at least 2012. Not. of Opp. ¶¶ 3-4.<sup>3</sup>

Applicant, in his answer, denies the salient allegations in the notice of opposition.<sup>4</sup>

## **I. The Record**

The record in this case consists of the pleadings and, by rule, the file of Applicant’s application.<sup>5</sup> Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). As noted above,

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<sup>2</sup> 1 TTABVUE. TTABVUE refers to the Board’s electronic docket. Citations in this opinion are to the TTABVUE docket entry number and, where applicable, the electronic page number where the document appears.

<sup>3</sup> 1 TTABVUE 4. Opposer attached to his notice of opposition a plain copy of the pleaded registration along with a partial copy of the registration from the Trademark Status Document Retrieval (“TSDR”) database of the USPTO showing current status of Registration No. 4243677.

<sup>4</sup> 4 TTABVUE.

<sup>5</sup> In the description of the record in Opposer’s brief, Opposer lists as evidence of record the “VOLTON Registration and the corresponding prosecution history.” Only the file of the

also of record is a plain copy of Opposer's pleaded registration and a partial copy obtained from the TSDR database submitted with Opposer's Notice of Opposition.<sup>6</sup>

During his assigned testimony period, Opposer also submitted:

- The testimony declaration, with Exhibits A-M, of Opposer Joseph Marchfield (Marchfield decl.).<sup>7</sup>

During his assigned testimony period, Applicant submitted:

- A notice of reliance on various dictionary definitions, printed publications and Internet materials relating to the meaning and strength of the marks at issue (Applicant's First Not. of Rel.);<sup>8</sup>
- A notice of reliance on Internet materials featuring a video capture of Opposer's website [made available and submitted as a DVD file] (Applicant's Second Not. of Rel.);<sup>9</sup>
- The declaration testimony of Applicant, Kyle C. Chittock (Chittock decl.);<sup>10</sup>  
and

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involved application is of record under Trademark Rule 2.122(b)(1). Accordingly, the VOLTON registration and prosecution history are not of record by rule, and only those materials properly submitted by Opposer during his testimony period (as specifically noted) are of record in this proceeding.

<sup>6</sup> Opposer resubmitted these same copies as Exhibits J and L to Opposer's testimony declaration. *See* 14 TTABVUE 67 and 73.

<sup>7</sup> 14 TTABVUE.

<sup>8</sup> 15 TTABVUE.

<sup>9</sup> 16 and 19 TTABVUE (bulky specimens).

<sup>10</sup> 17 TTABVUE.

- A notice of reliance on title and status copies of third-party registrations for VOLT-formative marks and Internet materials related to the meaning and strength of the marks at issue (Applicant's Third Not. of Rel.).<sup>11</sup>

Both Opposer and Applicant submitted briefs, and Opposer submitted a reply brief.

## II. Opposer's Pleaded Registration

As stated, Opposer's likelihood of confusion claims are based on alleged ownership of Registration No. 4243677 and prior common law rights in the mark VOLTON for "bicycles."

Because of Trademark Act Section 7(b), 15 U.S.C. 1057(b), the presumptions of ownership, validity and the exclusive right to use accorded to a registration on the Principal Register accrue only to the benefit of the owner. To rely on a pleaded registration, an opposer must submit into the record not only the registration, but also proof that the registration is subsisting and is owned by the opposer. *See Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710, 1713 (Fed. Cir. 1991).

The Board will accept an original or photocopy of the registration prepared and issued by the Office showing both the current status of and current title to the registration, a current copy of information from the electronic database records of the Office showing the **current status and title** of the registration, or "by appropriate identification and introduction during the taking of testimony." (emphasis added).

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<sup>11</sup> 18 TTABVUE.

See Trademark Rule 2.122(d), 37 C.F.R. § 2.122(d); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(1)(A) (2021), and authorities cited in that section.

Here, neither the plain copy of the certificate of registration for pleaded Registration No. 4243677 nor the partial TSDR copy of the pleaded registration suffice. As to the former, “[t]he Board has routinely held that the submission of a photocopy of a pleaded registration, by itself, is insufficient for purposes of establishing a party’s current ownership, or the current status, of the registration, and therefore does not suffice to make the registration of record.” *Sterling Jewelers Inc. v. Romance & Co.*, 110 USPQ2d 1598, 1601 (TTAB 2014). As to the partial TSDR copy, it does not cure the deficiencies inherent to the plain copy. Although the TSDR partial copy includes the status of pleaded Registration No. 4243677, the ownership information is missing.

Nonetheless, Opposer, in his testimony declaration at paragraph 15, stated:

On October 16, 2018, the Opposer filed a Combined Declaration of Use and Incontestability under Sections 8 & 15, **which the Opposer restates/redeclares here**. On November 1, 2018, the USPTO issued a corresponding Notice of Acceptance Under Section 8 and corresponding Notice of Acknowledgment Under Section 15. ... **The VOLTON Registration remains valid and subsisting.**

14 TTABVUE 6. Opposer included as attachments to his declaration a plain and partial TSDR copy of his registration as well as the notice of acceptance of his combined Section 8 and 15 affidavit.<sup>12</sup>

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<sup>12</sup> *See id.* at TSDR 67-73 (Marchfield decl., Exhibits J-K).

Accordingly, Opposer's pleaded registration has been properly submitted into the record.

### III. Entitlement to Statutory Cause of Action<sup>13</sup>

Entitlement to a statutory cause of action must be established in every inter partes case. See *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020) (citing *Lexmark Int'l v. Static Control Components*, 109 USPQ2d at 2067 n.4). A party in the position of plaintiff may oppose registration of a mark when it demonstrates an interest falling within the zone of interests protected by the statute, 15 U.S.C. § 1063, and a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021).

Opposer's entitlement to oppose registration of Applicant's mark in this case is established by his pleaded registration, which the record shows, by means of the declaration testimony of Joseph Marchfield (and accompanying exhibits), to be valid and subsisting, and owned by Opposer. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015).

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<sup>13</sup> Our decisions have previously analyzed the requirements of Section 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Mindful of the Supreme Court's direction in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*2 (TTAB 2020).

#### **IV. Priority**

In view of Opposer's submission into evidence of a valid and subsisting registration for his pleaded mark, and in the absence of a counterclaim to cancel that registration, priority is not in issue with respect to the mark and the goods listed therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).<sup>14</sup>

#### **V. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.* ("DuPont"), 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-1163 (Fed. Cir. 2019) (Board considers each *DuPont* factor for which there is evidence and argument). When analyzing these factors, the overriding concern is not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

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<sup>14</sup> Because of the presumptions afforded the cited registration under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), and because Opposer claimed common law rights in his VOLTON mark for goods identical to those in the pleaded registration, we do not determine whether Opposer has prior common law rights in his VOLTON mark, and base our decision solely on Opposer's pleaded Registration No. 4243677.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other *DuPont* factors for which there is evidence and argument, are discussed below.

A. The Goods, Channels of Trade and Classes of Purchasers

We begin our analysis with the second *DuPont* factor, which “considers whether ‘the consuming public may perceive [the respective goods] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014). In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant’s application and the pleaded registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

Applicant’s broadly worded recitation of “bicycles” encompasses Opposer’s more narrowly identified “electric bicycles.” *See e.g., In re Country Oven, Inc.*, 2019 USPQ2d 443903, \*4 (TTAB 2019) (quoting *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (“[w]here the identification of services is broad, the Board ‘presume[s] that the services encompass all services of the type identified’”)); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass

all the goods of the nature and type described therein). Thus, on the face of the respective identifications, the goods are legally identical.

Turning to the third *DuPont* factor, because the goods described in the application and the cited registration are legally identical, we presume that the channels of trade and classes of purchasers for those goods are the same. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers) (*cited in Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly ... ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....”); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”) *quoted in In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672-73 (TTAB 2018); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same). Therefore, the channels of trade and classes of purchasers overlap.

We accordingly find the *DuPont* factors concerning the relatedness of the goods, trade channels and classes of purchasers strongly favor a finding of likelihood of confusion. These *DuPont* factors are undisputed and, in fact, Applicant’s brief is silent as to them.

B. The Marks

1. Strength of Opposer's Mark

Because the strength of the cited mark may affect the scope of protection to which it is entitled, we consider Applicant's argument that Opposer's pleaded mark VOLTON is a weak mark entitled to a narrow scope of protection. Applicant particularly argues:

Because the VOLT and ON components of Opposer's mark are descriptive for electric bicycles, Opposer's VOLTON mark is descriptive and relatively weak, suggesting a narrow scope of protection. In addition, the record contains evidence of other VOLT-derived marks, both registered and in use in commerce for electric bicycles, bicycles or related goods and services

Applicant's brief, p. 14.<sup>15</sup>

As an initial matter, to the extent Applicant contends that Opposer's VOLTON mark is descriptive, such a contention constitutes an impermissible collateral attack on Opposer's pleaded registration. In the absence of a counterclaim for cancellation, this argument cannot be considered. *See* Trademark Rule 2.106(b)(3)(ii), 37 C.F.R. §2.106(b)(3)(ii); TBMP § 313.01 (2021) and the cases cited therein. *See also Contour Chair-Lounge Co. v. The Englander Co.*, 324 F.2d 186, 139 USPQ 285, 287 (CCPA 1963) (“[T]his is an opposition only and in an opposition, this court has always held that the validity of the opposer's registrations are not open to attack.”).

We nonetheless address Applicant's arguments that the pleaded mark is weak and entitled to a narrow scope of protection and consider the record evidence, particularly

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<sup>15</sup> 21 TTABVUE 14.

Applicant's proffered third-party use and registration evidence to determine if there is any appreciable weakness.

The strength of a mark rests on the extent to which "a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). For likelihood of confusion purposes, a mark's strength "varies along a spectrum from very strong to very weak." *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (citing *Palm Bay Imps.*, 73 USPQ2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).<sup>16</sup> Evidence of extensive registration and use of similar marks by others in the field can be powerful evidence of a mark's weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015).

We begin our analysis of the strength of Opposer's mark by recognizing that it is registered on the Principal Register without any claim of acquired distinctiveness. It is accordingly presumptively valid and inherently distinctive for the identified goods;

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<sup>16</sup> In determining the strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *See e.g., Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014). In this case, the record contains no evidence or argument regarding the commercial strength of Opposer's pleaded VOLTON mark, so we confine our analysis to the evidence of record regarding its inherent strength.

however, in the course of a *DuPont* analysis, we may acknowledge the weakness of a registered mark. *See* Trademark Act Sections 7(b) and 33(a), 15 U.S.C. §§ 1057(b) and 1115(a); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007).

To support his argument that the pleaded VOLTON mark is weak, Applicant relies on: (i) one application<sup>17</sup> and five registrations for marks incorporating the word or prefix VOLT for bicycles and related parts and accessories; (ii) webpage evidence showing use of the mark VOLT MOBILITY (the subject of cited application Serial No. 87886605 ([www.voltmobility.net/how-it-works](http://www.voltmobility.net/how-it-works))<sup>18</sup>; and (iii) webpage evidence showing use of the marks in Registration Nos. 5169614,<sup>19</sup> 5335101,<sup>20</sup> 3651382,<sup>21</sup> 4783913,<sup>22</sup> summarized in relevant part below.<sup>23</sup>

- Registration No. 5169614 for the mark VOLTBIKE for “Electric bicycles”<sup>24</sup>;
- Registration No. 3651382 for the mark VOLTAGE for “bicycles”<sup>25</sup>;
- Registration No. 5130177 for the mark VOLTU for various bicycle parts and accessories<sup>26</sup>;

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<sup>17</sup> We point out that third-party applications are evidence only of the fact that such applications were filed; unlike registrations, they are not evidence of the weakness of marks. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

<sup>18</sup> 18 TTABVUE 8.

<sup>19</sup> *Id.* at 12-13.

<sup>20</sup> *Id.* at 18-20.

<sup>21</sup> *Id.* at 38-42.

<sup>22</sup> *Id.* at 43.

<sup>23</sup> We focus our analysis on the evidence highlighted by Applicant in his brief.

<sup>24</sup> *Id.* at 9-11.

<sup>25</sup> *Id.* at 33-38.

<sup>26</sup> *Id.* at 28-32.

- Registration No. 5335101 for the mark RAYVOLT and design for “electric bicycles<sup>27</sup>; and
- Registration No. 4783913 for the mark OVERVOLT for “bicycles, motorized bicycles” and related items.<sup>28</sup>

Although “extensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established,” *Jack Wolfskin*, 116 USPQ2d at 1136 (citing *Juice Generation*, 115 USPQ2d at 1674, we have no such showing in this case. Applicant has presented, at most, five somewhat similar registrations, and Internet evidence of five different entities (four of which show use of the marks in the proffered registrations) using VOLT-formative marks, well short of the volume of evidence found convincing in *Jack Wolfskin* and *Juice Generation*. See also *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030 (TTAB 2016) (weakness found based on at least 85 actual uses of ROSE-formative marks for similar services, eight similar third-party registrations, expert testimony and other evidence regarding the common nature of ROSE-formative marks in the industry, and testimony by opposer that it did not vigorously enforce its mark).

We appreciate that the plain meaning of the individual words “VOLT” and “ON” are not completely arbitrary when used in connection with Opposer’s goods. Indeed, Opposer acknowledged that: “the terms ‘VOLT[] and ‘ON’ have some association with electric bicycles” in that they “suggest some power-related feature or function of the

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<sup>27</sup> *Id.* at 14-17.

<sup>28</sup> *Id.* at 39-42.

goods.” Opposer’s reply brief, p. 4. However, on this record, as more fully discussed below, Applicant has not shown that the pleaded mark as a whole is so weak that it is not entitled to protection against Applicant’s similar mark.

Based on the foregoing, we find the pleaded mark to be of average inherent strength and provide it with a normal scope of protection for a somewhat suggestive, yet distinctive mark.

## 2. Similarity of the Marks

We now consider the *DuPont* likelihood of confusion factor concerning the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that where, as here, the goods are legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 U.S.P.Q.2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721). *See also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Because the goods at issue include bicycles and electric bicycles, the average customer is an ordinary consumer who buys or rides, or seeks to buy or ride, bicycles or electric bicycles.

For convenience, we again note that Applicant’s applied-for mark is  and Opposer’s pleaded mark is VOLTON, in standard character form. Applicant argues that the dissimilarity of the marks is the dispositive factor because the marks are unique in sight, sound, connotation and the commercial impression.

We disagree. As to sight and sound, we find the marks similar in structure and cadence. Each mark comprises, as its sole or literal element, a single two-syllable, six letter term that includes the same last five letters “O-L-T-O-N, and differ only by the first letters (B and V) which rhyme. *See e.g., Apple Comput. v. TVNET.net Inc.*, 90 USPQ2d 1393, 1396 (TTAB 2007) (VTUNES.NET vs. ITUNES); *Interlego AG v. Abrams/Gentile Entm’t Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (“Obviously, the

marks LEGO and MEGO are extremely similar in that they differ simply by one letter.”). *See also In re Energy Telecomms. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983) (“Slight differences in the sound of similar marks do not avoid a likelihood of confusion.”).

The lightning bolt design in Applicant’s mark fails to distinguish it from Opposer’s mark. More particularly, the lightning bolt design, comprising a portion of the letter “B” in Applicant’s mark, is not likely to be perceived as a unique element given its subtle stylization. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010) (holding applicant’s mark, MAX with pillar design, and registrant’s mark, MAX, likely to cause confusion, noting that the “addition of a column design to the cited mark ... is not sufficient to convey that [the] marks ... identify different sources for legally identical insurance services”).

Moreover, where, as here, both words and a design comprise a mark, the words are normally accorded greater weight because they are more likely to make an impression upon purchasers, would be remembered by them, and would be used by them to call for or discuss the goods. *Viterra*, 101 USPQ2d at 1912 (citing *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed”)). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the

marks in their entirety. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *Viterra*, 101 USPQ2d at 1908.

In positing that the marks are visually dissimilar, Applicant's arguments (and evidence) extensively focus on how Opposer's mark is displayed on his goods in the marketplace. However, because Opposer's mark is registered in standard characters, Opposer is not limited to any particular depiction of his mark; it may be displayed in any lettering style; the rights reside in the wording and not in any particular display. *Viterra*, 101 USPQ2d at 1909; *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009). Thus, Opposer may display his VOLTON mark in the identical font style, size and color in which the literal element of Applicant's applied-for mark is shown. *See Trademark Rule 2.52(a)*; 37 C.F.R. § 2.52(a).

Also, we are not persuaded by Applicant's argument that the marks have distinct pronunciations. More specifically, Applicant argues (pointing to Opposer's acknowledgment) that Opposer's VOLTON mark likely will be pronounced by consumers as "VOLT-ON" while his mark is likely to be pronounced as \ 'bōl-tən \.<sup>29</sup> Both Opposer and Applicant may prefer or assume a particular pronunciation of his respective mark. However, because there is no correct way to pronounce a trademark, *see e.g., Viterra*, 101 USPQ2d at 1912 ("there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner."); *Trak, Inc. v. Traq Inc.*, 212 USPQ 846, 850 (TTAB 1981) ("it is not possible for a trademark owner to control with certainty how purchasers will vocalize

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<sup>29</sup> 21 TTABVUE 13, (Applicant's brief p. 13 (internal citation omitted)).

their trademarks”), purchasers and prospective purchasers may pronounce the two marks in a rhyming manner.

As to connotation and commercial impression, Applicant, on the one hand, argues that his mark conveys the impression of a “well known surname” (as the election of the mark was influenced by “an awareness of and perceived connection to Ogden Bolton Jr., an early inventor of electric bicycles” (internal citations omitted)) and as a geographical location (as “Bolton is also a commonly used geographic name for towns throughout the United States” (internal citations omitted)). On the other hand, Applicant contends that:

In viewing Applicant’s stylized  mark, consumers first encounter the image of a thunderbolt:



As an image, the thunderbolt design creates a strong and lasting impression. The thunderbolt is a notoriously “strong” symbol, and the connotation of a thunderbolt being included in a stylized design is that of strength, power, [and] decisiveness.”

Applicant’s brief pp. 10-13.<sup>30</sup> Applicant goes on to argue that the surname, geographical and thunderbolt connotations are absent from Opposer’s mark which has the connotation to electric bicycle consumers as “volts’ being ‘on.’” *Id.* at 9.<sup>31</sup>

Here, the record shows that the term “volt,” a component of the cited mark, when used in connection with electric bicycles is defined as “a measurement of electric

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<sup>30</sup> *Id.* at 10-13.

<sup>31</sup> *Id.* at 9.

potential.”<sup>32</sup> The record is devoid, however, of any evidence that consumers appreciate any connection between Applicant’s electric bicycles and Ogden Bolton or to any geographic location. Instead, given the electric nature of Applicant’s bicycles and the thunderbolt design which Applicant contends creates an image of “power,” it is more likely that the connotation conveyed by Applicant’s **BOLTON** mark is similar to that conveyed by Opposer’s VOLTON mark. That is, both marks convey the “power” or electric characteristic of their legally-identical electric bicycles.

While there are differences between the two marks, when considered as a whole, they are more similar in sound, appearance, connotation and commercial impression than they are dissimilar.

The similarity of marks *DuPont* factor thus weighs in Opposer’s favor.

#### C. Purchaser Sophistication and Purchasing Care

While not repeated in his brief, Applicant, in his testimony declaration, made the following arguments:

4. My observation as an electric bicycle retailer is that purchasers of electric bicycles are very unlikely to make an impulse purchaser – rather, most customers spend a considerable amount of time researching types of electric bicycles and desired features for their expected use of an electric bike.
5. The typical retail price of a mainstream electric bicycle is [sic] ranges between approximately \$1,500 to \$4,000, and

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<sup>32</sup> 18 TTABVUE 44 (See An article from the website of MURF Electric Bikes, at (<https://murfelectricbikes.com/pages/why-do-volts-matter-52volts-vs-48-volts-vs-36-volts>), titled Why Volts Matter: 52 [volts vs 48 volts vs 36 volts]).

the price for specialty/top-of-the-line models can exceed \$8,000.

6. Consumers who purchase electric bicycles typically consider the expense to be a significant expense. In my experience, they typically spend a significant amount of time researching and selecting an appropriate bicycle prior to purchase.

Chittock decl. at ¶¶ 4-6.<sup>33</sup>

However, neither Opposer's nor Applicant's identification of goods contains limitations as to classes of purchasers or price of products. We therefore must consider that purchasers may include ordinary consumers who may rent electric bicycles or purchase lesser expensive models, relying only on sales person guidance. Moreover, precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the "least sophisticated consumer in the class"). We cannot resort to extrinsic evidence to restrict the nature or use of the goods sold by the parties. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). And, even careful or sophisticated purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of very similar marks on or in connection with goods. *See In re Shell Oil Co.*, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

We therefore find this *DuPont* factor neutral.

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<sup>33</sup> 17 TTABVUE 4. *See also* 18 TTABVUE 12-13, and 39 (Applicant's Third Not. of Rel.).

## VI. Conclusion

After considering all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments relating thereto, we conclude that confusion is likely between Applicant's **BOLTON** mark for "electric bicycles" and Opposer's registered VOLTON mark for "bicycles." We so conclude due to the similarity of the marks, the legally identical goods, and presumed identical trade channels and classes of purchasers.

**Decision:** The opposition on the ground of likelihood of confusion under Trademark Act Section 2(d) is sustained.